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No. 92-1717

In the Supreme Court of the United States

OCTOBER TERM, 1992

BROWN & ROOT, INC.,

Petitioner

v.

STEPHEN A. MISTICH,

Respondent

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

MOTION OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AND THE INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE SUPPORTING PETITIONER

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MOTION OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AND THE INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 37 of the Rules of this Court, the National Ocean Industries Association (NOIA), the International Association of Drilling Contractors (IADC) and the International Association of Geophysical Contractors

(IAGC) respectfully move for leave to file the accompanying brief as amici curiae in support of petitioner in this case. Counsel for petitioner has consented to the filing of this brief,* but counsel for respondent has refused consent.

As outlined more fully below, amici are national trade associations that represent the interests of numerous companies involved in the development of our ocean resources. NOIA's membership ranges across a wide spectrum of ocean industries, while IADC's member companies are involved in offshore oil and gas drilling operations throughout the world and IAGC's member companies are involved in all phases of geophysical operations throughout the world. The question whether seamen may recover punitive damages under the general maritime law is of critical importance to the members of all three organizations, many of which are routinely exposed to Jones Act and general maritime litigation. NOIA, IADC and IAGC are intimately familiar with the issues in this case and can provide a perspective on these issues forged from everyday experience.

For the foregoing reasons, the motion of NOIA, IADC and IAGC to file the accompanying brief as amici curiae in support of petitioner should be granted.

Respectfully submitted.

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* Petitioner's counsel's letter granting consent has been filed with the Court.

QUESTION PRESENTED

Whether punitive damages are available under the general maritime law in a seaman's unseaworthiness action against his employer.

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BRIEF FOR THE NATIONAL OCEAN INDUSTRIES ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AND THE INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The National Ocean Industries Association (NOIA) is a national trade association that represents all facets of the

offshore oil and natural gas industries. NOIA's membership includes approximately 250 small, medium and large business enterprises engaged in such diverse activities as drilling, offshore construction, equipment manufacture, transportation, exploration, petroleum production, and others. NOIA is dedicated to the belief that the development of ocean energy resources will play an increasingly important role in the continued growth and prosperity of the United States.

The International Association of Drilling Contractors (IADC) represents the interests of drilling contractors throughout the world. Many of the more than 300 member companies of IADC drill for oil and gas in the offshore regions of the United States. IADC is dedicated to facilitating safe, efficient and environmentally responsible drilling operations in order to benefit its members, associated companies in oilfield services, and the public at large.

The International Association of Geophysical Contractors (IAGC) is an international organization of approximately 200 companies whose member companies are involved in offshore geophysical exploration operations throughout the world.

Because NOIA, IADC and IAGC members are at the forefront of developing the ocean resources, they frequently are involved in tort litigation based on the Jones Act, 46 U.S.C. § 688, and the general maritime law. All three organizations therefore are vitally concerned with a broad array of legal issues that affect the offshore industries. This case, in particular, presents a question of surpassing importance to the maritime community. As petitioner explains, the lower federal and state courts are sharply divided on the question whether punitive damages are available to seamen suing under the general maritime law. In addition to the direct costs of the damage awards themselves, that conflict creates substantial uncertainty within the maritime community and invites unjustified forum shopping by plaintiffs. Because the financially imperiled ocean

industries can ill afford such costs – and because such costs are legally unwarranted – we respectfully ask this Court to grant Brown & Root's petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twice in the last 15 years, this Court has exercised its authority under the Admiralty Clause to conform the damages available under the general maritime law with the damages available under parallel federal statutes. *See Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). In each of these cases, plaintiffs had sought to obtain a greater measure of damages under the general maritime law than they could have received under applicable congressional enactments. In each case, however, this Court rejected that effort in favor of a principle of uniformity. That uniformity principle is simple and straightforward: recovery under the general maritime law may not exceed the damages available under parallel statutory causes of action. The Louisiana Court of Appeal violated that principle, and it did so on an issue that has far-reaching implications for the offshore industries – the availability of punitive damages in a seaman's action against his employer under the general maritime law.

For three reasons, we believe that the petition should be granted. First, the availability of punitive damages has emerged in recent years as an issue of surpassing importance in maritime litigation, with lower courts and juries in coastal areas handing down decisions and verdicts in rapid-fire succession just in the two and one-half years since *Miles* was decided (including a $10 million punitive damages verdict less than three weeks ago). Such large punitive damage awards already have created severe economic pressures in an industry that can ill afford such financial exactions. Second, the Louisiana Court of Appeal's decision is in direct conflict with the recent decision of the U.S. Court of Appeals for the Sixth Circuit in *Miller v. American President Lines, Ltd.*, Nos. 91-

3602/3837 (Mar. 23, 1993). Finally, the decision below contravenes this Court's decision in *Miles* (and its antecedent, *Higginbotham*), both of which require courts to take their cues from statutory law in defining the contours of the general maritime law.

ARGUMENT

THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT CONFLICTS WITH A RECENT SIXTH CIRCUIT CASE, VIOLATES WELL-SETTLED ADMIRALTY PRINCIPLES, AND THREATENS THE ECONOMIC FUTURE OF THE MARITIME INDUSTRY

A. The Question Presented Has Powerful and Recurring Implications For All Segments of the Maritime Industry

The use and development of the rich resources found in our oceans has fostered numerous businesses, large and small, dedicated to drilling, transportation, communications, offshore construction, geophysical exploration, research and technology, and more. These businesses are a major source of jobs and represent a key segment of the economy in the Gulf Coast region, which is the "home base" for much of the offshore activity connected with petroleum and gas production. Many other types of offshore industries, particularly those involved in shipping, towing and navigation, are spread throughout both coasts and the Gulf, and play important roles in the economic well-being of countless communities. Moreover, many of these industries – particularly those associated with energy production – have suffered significant financial setbacks in recent years as the maritime economy in general has declined.

Punitive damages have imposed special burdens of their own. Since *Miles* was decided, litigants have, with greater and greater frequency, sought punitive damages in lawsuits

based on general maritime law – and have done so in a wide range of factual and business contexts. In addition to the 17 post-*Miles* reported federal cases noted by petitioner (Pet. 19), our research reveals at least 16 unreported federal cases in which courts were confronted with a claim for punitive damages. Nine of those – also cited by petitioner (at Pet. 7 n.5; 9 n.7) – address the availability of punitive damages in claims based on unseaworthiness, while the remaining seven involve punitive damages for other general maritime claims brought by seamen against their employers.[1] And, in addition to the four post-*Miles* state cases cited by petitioner,[2] two other state courts (both in Louisiana) have confronted the issue as well.[3] Moreover, in view of this significant volume of accessible decisions, and the fact that many trial court decisions simply are not published, it is reasonable to suppose that there are additional cases that are available neither in the published reports nor through the electronic retrieval services.

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[1] *Bedker v. Harvester Enter.*, 985 F.2d 571 (9th Cir. 1993) (unpublished disposition); *Knighton v. Tidex Marine*, No. 92-0706, 1993 WL 53005 (E.D. La. Feb. 16, 1993); *Breshears v. River Marine Contractors, Inc.*, No. 92-1850, 1992 WL 245656 (E.D. La. Sept. 10, 1992); *LeBleu v. Mud Control Equipment Corp.*, No. 90-4248, 1991 WL 110406 (E.D. La. June 10, 1991); *Collinsworth v. Oceanic Fleet, Inc.*, No. 91-866, 1991 WL 165732 (E.D. La. Aug. 17, 1991); *Bachu v. Int'l Marine Terminals*, No. 91-1526, 1991 WL 211519 (E.D. La. Sept. 27, 1991); *Odeco, Inc. v. Cornish*, No. 90-0505, 1991 WL 148746 (E.D. La. July 22, 1991).

[2] *Jenkins v. Kerr-McGee Corp.*, 613 So. 2d 1097 (La. Ct. App.), *writ denied*, ___ So. 2d ___ (La. 1993); *Sky Cruises, Ltd. v. Andersen*, 592 So. 2d 756 (Fla. Dist. Ct. App.), *cert. denied*, 113 S. Ct. 466 (1992); *Williams v. Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App. – Beaumont 1992); *Brown v. State of Alaska*, 816 P.2d 1368 (Alaska 1991).

[3] *Theriot v. McDermott, Inc.*, 611 So. 2d 129 (La. Ct. App. 1992), *writ denied*, 615 So. 2d 243 (La. 1993); *Gray v. Texaco*, 610 So. 2d 1090 (La. Ct. App. 1992), *writ denied*, ___ So. 2d ___ (La. 1993).

Not surprisingly, the defendants in the majority of these cases have been vessel operators and companies that perform offshore drilling operations. But a brief survey of the many punitive damages cases reveals that all segments of the maritime industry – representing numerous important sectors of the economy – have been powerfully affected by the issue presented in this case. *See, e.g., Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992) (major petroleum producer both offshore and on land); *Miller v. American President Lines, Ltd.*, Nos. 91-3602/3837 (6th Cir. Mar. 23, 1993) (several shipowners); *Stoufflet v. Apex Towing Co., Inc.*, No. 90-4476, 1991 WL 194759 (E.D. La. Sept. 20, 1991) (towing company); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991) (marine construction company); *Theriot v. McDermott, Inc.*, 611 So. 2d 129 (La. Ct. App. 1992) (offshore oilfield service contractor), *writ denied*, 615 So. 2d 243 (La. 1993); *Ellison v. Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992) (helicopter transportation company); *Williams v. Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App. – Beaumont 1992) (offshore drilling company).

Notwithstanding (and perhaps because of) the conflict over the availability of punitive damages under the general maritime law, the flow of new cases shows no signs of abating. What is more, in those jurisdictions in which punitive damages are available, the magnitude of punitive damages continues an upward spiral – a trend with which many land-based industries have become fully familiar in recent years. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991) (O'Connor, J., dissenting) (expressing concern about "staggering" punitive damage judgments); P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) (discussing the marked increase in punitive damage awards in recent years). Indeed, just three weeks ago, a jury in Fort Bend County, Texas (outside Houston) awarded $10 million in punitive damages

against the Diamond M Co., a leading drilling contractor, for an injury to a seaman that resulted from the alleged unseaworthiness of an offshore rig. *Cockerham v. Diamond M Co.*, No. 65,405 (Tex. Dist. Ct. May 8, 1993).[4] Just as some offshore companies have fled certain jurisdictions because of the costs of litigation under the Jones Act, 46 U.S.C. App. § 688[5] one can expect increasing economic dislocation as a result of awards of punitive damages under the general maritime law.

But the direct costs of such awards are not all that is at stake. In addition, the ocean industries are subject to the inevitable transaction costs that arise from unsettled legal rules in an area fertile with litigation. Those costs are compounded, moreover, for the many companies that necessarily do business in more than one jurisdiction. Such companies are subject to lawsuits under the general maritime law in several jurisdictions and in both federal and state court. Taken together, these costs – both the damages themselves and the transaction costs of litigating them – threaten the very livelihood of industries that have suffered through a wrenching economic downturn in the last decade.[6]

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[4] Compensatory damages in the case, in which a roustabout suffered broken bones, a punctured kidney and a collapsed lung, totaled $2.5 million, leaving a ratio of punitive to compensatory damages of 4 to 1. The Court in *Pacific Mutual* considered such a ratio "close to the line" of constitutional infirmity. 111 S. Ct. at 1046.

[5] Officials at American Oilfield Divers, a leading diving company in the Gulf Coast region, have informed the President of NOIA that the company will move out of Brazoria County, Texas, because of the high cost of Jones Act litigation in that jurisdiction.

[6] For example, the petroleum and natural gas industries as a whole (a substantial portion of which is represented by offshore operations) lost 359,000 jobs between 1982 and the middle of 1992. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Employment and Earnings*, Section V, Table 2 (1993).

This, then, is the setting within which the case comes before the Court: a recurring question of law, of surpassing importance, that vitally affects a wide array of maritime industries. And that question, as we briefly explain below, and as the petition states in more detail, is otherwise deserving of this Court's review: the decision of the Court of Appeal is in sharp conflict with the Sixth Circuit's decision in *Miller v. American President Lines, Ltd.*, *supra*, and contravenes important principles of uniformity and deference to congressional judgment.

B. This Court Should Resolve the Split in the Lower Courts Over Punitive Damages and Should Ensure Uniformity in Maritime Damages

1. The Conflict Between the Decision Below and the Decision of the Sixth Circuit is Squarely Presented

As petitioner explains in more detail (Pet. 6-14), the lower state and federal courts are sharply divided on the question whether seamen may recover punitive damages against their employers under the general maritime law. On the one hand, the court below, along with several other courts that are highly influential in maritime law (including state and federal courts in Louisiana and an appellate court in the coastal region of Texas), have upheld the availability of punitive damages. These cases include longstanding authority in the Fifth Circuit (*In re Merry Shipping, Inc.*, 650 F.2d 622 (1981)), on which the Louisiana Court of Appeal relied, as well as decisions in at least two other jurisdictions that have likewise followed *Merry Shipping* (*Brown v. State of Alaska*, 816 P.2d 1368 (Alaska 1991); *Williams v. Penrod Drilling*

Corp., 845 S.W.2d 349 (Tex. Ct. App. – Beaumont 1992)).[7]

On the other hand, the Sixth Circuit, in *Miller*, squarely held that punitive damages are *not* available to a seaman in a suit against his employer based on unseaworthiness. The Sixth Circuit reasoned that because punitive damages are non-pecuniary in nature, and because *Miles* limits a seaman only to pecuniary damages as are available under the Jones Act, punitive damages are unavailable as a matter of law. See *Miller*, slip op. at 13-14. The Sixth Circuit's decision, in short, is flatly inconsistent with the decision below.

This case presents an excellent vehicle for resolving that conflict. The relevant facts and issues in this case are identical to those in *Miller*. In both cases, suit was brought under the Jones Act alleging negligence and under the general maritime law alleging unseaworthiness. In both cases, the trial court allowed punitive damages, and the question on appeal was whether such damages are precluded as a matter of law. This Court should resolve that conflict so that – in this important respect, as in others – maritime law can function as "'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970) (*quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).

2. The Decision Below Departs From Well-Established Maritime Principles

In addition to widening the conflict among the lower courts on the question of punitive damages, the decision

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[7] Several federal district court decisions in Louisiana are also in accord with the decision below. *Logue v. Tidewater, Inc.*, No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992); *Davis v. Penrod Drilling Corp.*, No. 91-1458, 1991 WL 264541 (E.D. La. Dec. 2, 1991); *Hannon v. Waterman S.S. Corp.*, No. 90-1175, 1991 U.S. Dist. LEXIS 6823 (E.D. La. May 21, 1991).

below contravenes two closely related and well-settled principles that have guided this Court's admiralty cases: uniformity of remedies between statutory and general maritime causes of action; and deference to the policy judgments made by Congress. Had the Louisiana Court of Appeal respected those principles, it would have reached the same judgment as the Sixth Circuit in *Miller*.

The Court's decision in *Higginbotham* illustrates those two principles. In *Higginbotham*, the representatives of three persons killed on the high seas brought suit under the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768, and the general maritime law. Two of the representatives recovered damages for their pecuniary losses, but the court of appeals, reversing the district court, held that they could also recover damages for loss of society, a non-pecuniary loss. 436 U.S. at 619-20. This Court reversed. The Court explained (*id.* at 623) that DOHSA limits recovery for death on the high seas to pecuniary damages, and it held that "DOHSA should be the courts' primary guide" in defining the remedies available under the general maritime law. *Id.* at 624. Reliance on DOHSA was essential, the Court observed, "both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Id.* Applying those principles, the Court held that the damages available for deaths on the high seas could be no broader under the judicially-created wrongful death action than under DOHSA's wrongful death action. The Court thereby ensured that the representatives of all persons killed outside territorial waters would recover the same measure of damages regardless of the source of their action.

More recently, in the *Miles* decision, the Court applied the same principles of uniformity and deference to congressional judgment. The issue in *Miles* was whether a Jones Act seaman's representative, suing under the general maritime law theory of unseaworthiness for a death that occurred in coastal waters, could recover damages for loss of

society. Applying "[t]he logic of *Higginbotham*" (498 U.S. at 31), the Court looked to statutory law as the source for the remedies available under the general maritime law. Because loss of society damages are non-pecuniary, and because the Jones Act permits recovery only of pecuniary damages, the Court held that damages for loss of society could not be awarded to a seaman in a general maritime action. Uniformity and deference to Congress required that result: as the Court put it, "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Miles*, 498 U.S. at 32-33.[8]

The uniformity principle underlies not only the issue of damages, but the very existence of substantive causes of action under the general maritime law. Prior to the Court's decision in *Moragne v. States Marine Lines, Inc.*, *supra*, plaintiffs could bring a wrongful death action for all deaths on the high seas (under DOHSA), for deaths of seamen due to negligence regardless of where they occurred (under the Jones Act), and for deaths in territorial waters when an applicable state statute so provided. But state wrongful death statutes

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[8] *Miles* restored uniformity in another respect as well. Prior to the decision in *Higginbotham*, the Court had held that loss of society damages were recoverable in a general maritime wrongful death action for a death within the three-mile limit. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 591 (1974). *Higginbotham* made clear that such loss of society damages could not be awarded in an action arising outside coastal waters; as a result, plaintiffs were entitled to very different recoveries depending solely on whether their actions arose within or without the three-mile limit. The Court eliminated that lack of uniformity in *Miles*, by limiting the reach of *Gaudet* to longshoremen only (thus rendering it effectively inoperative, because longshoremen now are statutorily barred from suing their employers, see 33 U.S.C. § 905(b)). The Court thereby "restore[d] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 33.

could not be applied to seamen killed in territorial waters as a result of unseaworthiness,[9] and indeed there was *no* recovery for wrongful deaths in territorial waters due to unseaworthiness in the absence of an applicable state statute.

In order to remedy these and other "anomalies" created by the patchwork of state and federal wrongful death statutes, the Court overruled its prior decision in *The Harrisburg*, 119 U.S. 199 (1886), and permitted a general maritime law action for wrongful death. In the Court's view, the uniformity thus engendered would "not only * * * further the concerns of both [the Jones Act and DOHSA] but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne*, 398 U.S. at 402 (*quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).

The decision below contravenes the uniformity and deference principles reflected in *Moragne*, *Higginbotham*, and *Miles*. "Congress retains superior authority" in admiralty matters, so that when Congress legislates in this area, "an admiralty court should look primarily to these legislative enactments for policy guidance." *Miles*, 498 U.S. at 27. More generally, as the Court has often held, courts should defer to relevant congressional policy in *all* areas of federal common law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981). *See also New Jersey v. New York*, 283 U.S. 336, 348 (1931) (federal common law is "subject to the paramount authority of Congress"). And, of course, the duty of deference falls not only upon federal courts but also upon

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[9] Such seamen are covered by the Jones Act's wrongful death provisions, which allows recovery for deaths resulting from negligence and pre-empts state statutes applicable to seamen. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154-156 (1964).

state courts – like the Louisiana Court of Appeal – when they are engaged in applying federal common law.

In short, the Court's decisions make clear that where Congress has settled upon a measure of damages available to a particular class of persons or for accidents in a particular territory, courts may not supplement those statutes by allowing additional damages under the general maritime law. The Louisiana Court of Appeal clearly disregarded that settled principle by affording respondent an entitlement to punitive damages that he could not receive under the Jones Act. Because that decision is mistaken, and because it is in sharp conflict with the decision of the Sixth Circuit in *Miller*, the petition for a writ of certiorari should be granted.[10]

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[10] We also agree with petitioner that, separate and apart from the question of punitive damages in unseaworthiness actions, this case provides an opportunity to resolve the longstanding and persistent conflict among the federal courts over the availability of punitive damages in suits under the general maritime law for maintenance and cure. Although this case does not directly involve punitive damages for maintenance and cure, the rule of law that petitioner seeks in this case would likely resolve the maintenance and cure conflict as well. Just as this Court's decision in *Moragne* substantially settled the "tortuous development of the law of wrongful death in the maritime context," *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 212 (1986), a decision in this case would bring order to the confusing seascape of general maritime law remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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